

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-5004

In The  
**United States Court of Appeals**  
For The Second Circuit

In the Matter of  
**VISUAL SOUNDS, INC.,**

*Debtor-Appellee,*

vs.

**GENERAL PACKAGING SERVICE, INC.,**

*Appellant.*

*In Bankruptcy — On Appeal from Order of the United States  
District Court for the Southern District*

## BRIEF FOR APPELLEE

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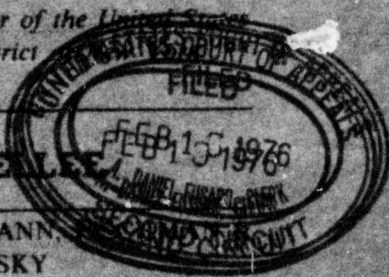
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*Law and Financial Printing*

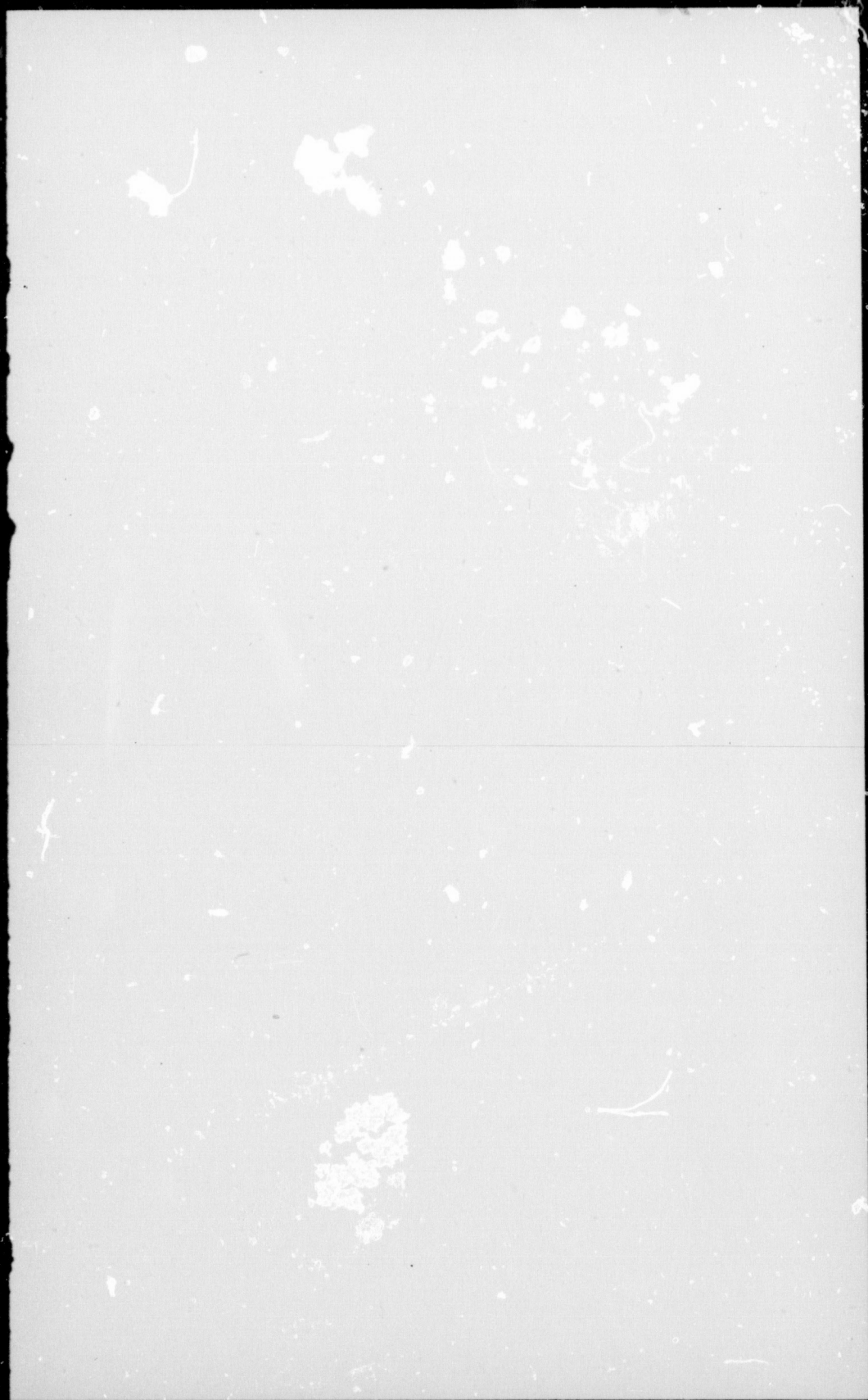
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VISUAL SOUNDS, INC.,

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*In Bankruptcy — On Appeal from Order of the United States  
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**BRIEF FOR APPELLEE**

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**STATEMENT OF FACTS**

On or about March 1, 1972, Visual Sounds, Inc., Debtor, ("Visual"), bought all the issued and outstanding shares of the General Magnetic Tape Co., Inc. ("Tape"), from the appellant, General Packaging Services, Inc. ("Packaging") (Appendix, 21a).

On or about March 1, 1972, Visual paid to Packaging \$50,000. (Subsequently, Packaging obtained an additional \$50,000 from Visual for a total of \$100,000. (23a).)

On or about March 1, 1972, Packaging delivered to Visual all of the issued and outstanding shares of Tape in good form for transfer with assignments attached to the certificates. The sale and transfer of shares was complete and unconditional. The Contract of Sale vested title of the Tape shares in Visual and made no provision for return of the shares to Packaging under any conditions, except if Visual chose to rescind the action within the first year (25a).

On or about March 1, 1972, the shares of Tape, delivered by Packaging to Visual were cancelled and new certificates of Tape were issued to Visual registered in the name of Visual and delivered into the possession of Visual (25a). Since March 1, 1972, the shares of Tape have been registered solely in the name of Visual.

On or about October 2, 1973, lawsuits relating to the purchase of Tape by Visual were settled and the Settlement Agreement and Releases was executed by the parties (5a).

Pursuant to Paragraph 5a of the Settlement Agreement and Releases, the shares of Tape still registered in the name of Visual, were delivered to Harold G. Israelson, Esq. who was to "act merely as a gratuitous custodian of such stock certificates of GMT (sic meaning Tape) and not as an Escrow Agent, nor as a pledgeholder, nor as a guarantor, nor in any other matter or



capacity, but solely as a custodian of such stock certificates." It is further clearly stated that "said custodian account shall not be, nor considered to be, nor construed to be a security interest, collateral, pledge, lien or encumbrance of any kind, nature or description; and all of the rights, titles and interest of VSI (sic meaning Visual) in and to such shares shall be and continue to be clear of any and all liens and encumbrances for any and all purchases whatsoever" (26a).

On October 2, 1973, the shares of Tape were delivered to Mr. Israelson "pursuant to the provisions of a Stipulation of Settlement of even date." (26a). On April 8, 1974, Visual filed a petition pursuant to Chapter XI of the Bankruptcy Act, in the United States District Court, Southern District of New York.

On August 13, 1974, in response to a lawsuit brought by Packaging in the New York State Supreme Court (10a), Visual obtained an Order to Show Cause directing the turnover of the Tape shares (1a).

### ARGUMENT

**Where property is held by a custodian who makes no claim to its ownership, the Bankruptcy Court has jurisdiction to proceed summarily and direct its turnover despite third-party claims.**

The Bankruptcy Judge found that Visual had title to the Tape stock at the time the Chapter XI petition was filed (31a). The Settlement Agreement and Releases states specifically "... all of the rights, titles and interests of VSI in and to such shares (the Tape shares), shall be and continue to be clear of any

and all liens and encumbrances for *any and all* purposes whatsoever." (Emphasis added. (8a)).

The original agreement between Visual and Packaging absolutely vested title in Visual (39a). The certificates of Tape stock were registered on its books as the property of Visual and certificates of Tape stock were issued to Visual in its name (25a).

"A certificate of stock in a corporation, stating that a designated person is owner of a certain number of shares, transferable only on the books on the indorsement and surrender of the certificate, is a continuing affirmation of the ownership of the person named therein, and that the corporation will not transfer the stock upon its books until a surrender of the certificate, and that the owner has the power and right to transfer and sell the stock until such power and right are lawfully terminated." 18 C.J.S. Sec. 258(d).

The shares of Tape issued and registered in the name of Visual were delivered and held by Harold G. Israelson, Esq. as a "gratuitous custodian of such stock certificates" and "not as an escrow agent, nor as a pledge holder, nor as a guarantor, nor in any other manner or capacity, but solely as a custodian of those stock certificates." (8a). Mr. Israelson cannot and does not make any claim to those stock certificates and has not appeared herein.

"Property held for the bankrupt by another who makes no claim to it may be summarily

collected by the bankruptcy court, despite the fact that third persons make claims adverse to the bankrupt. *Orinoco Iron Co. v. Metzel* (C.C.A.) 230 F. 40; *In re Hoey, Tilden & Co.* (D.C.) 292 F. 269. See also *Buss v. Long Island Storage Warehouse Co.* (C.C.A.) 64F (2d) 338, 339."

*In Matter of Goldman*, 5 Fed. Supp. 973 at 974 (S.D.N.Y. 1933). The same Judge (Patterson, J.) in the same court (United States District Court, Southern District of New York) in the same year (1933) reaffirmed the same principle. In *In re Kerr*, 5 Fed. Supp. 898 at 899, it was held:

"Property is deemed to be in possession of the court when it is in the hands of the bankrupt's agent or bailee at the time when the petition in bankruptcy is filed, or *when it is held by another who makes no claim of his own to it.* (Emphasis added). *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426 S. Ct. 396, 68 L. Ed. 770; *Johnston v. Spencer* (C.C.A.) 195 F. 215; *In re Hoey Tilden & Co.* (D.C.) 292 F. 269."

See also *In re Eakin*, 154 F.2d 717, 2d Cir. (1946) where it was held (at 719) "Possession of the Bankruptcy Court exists . . . where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; . . ."

The propriety of the Bankruptcy Court determination herein is virtually axiomatic and should be sustained.



**CONCLUSION**

Under the provisions of Bankruptcy Rule 810, "The court shall accept the referee's findings of fact unless they are clearly erroneous . . . ."

It is respectfully submitted that the Bankruptcy Judge's determination is legally correct and supported by the findings and that the decision of the Judge should be affirmed.

Respectfully submitted,

*Friedman, Fischman & Chikofsky*

FRIEDMANN, FISCHMAN &  
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*Attorneys for Debtor-Appellee*

Harold Fischman  
*Of Counsel*

~~NEW YORK~~ ~~COURT~~ ~~OF~~ ~~APPEALS~~  
~~FOR~~ FOR THE SECOND CIRCUIT

Visual Sound,  
Debtor - Appellee

- against -

General Packaging  
Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

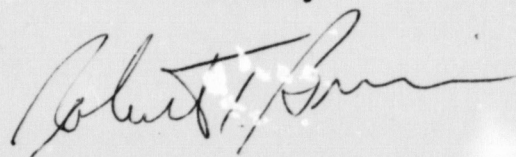
I, Victor Ortega, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1027 Avenue St. John, Bronx, New York

That on the 13th day of February 1976 at 405 Lexington Avenue, New York, New York

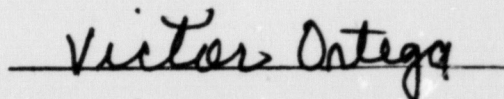
deponent served the annexed Appellee upon  
MILLER & BUSH

the Attorney in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 13th  
day of February 1976



ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977



VICTOR ORTEGA